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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 604

S. H. SQUIRE, AS SUPERINTENDENT OF BANKS OF THE STATE
OF OHIO, IN CHARGE OF THE LIQUIDATION OF THE BUSINESS
AND PROPERTY OF THE UNION TRUST COMPANY,

Petitioner,

vs.

CLIFFE U. MERRIAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

MAY IT PLEASE THE COURT:

I.

Opinions Below.

The opinion of the California Supreme Court in this case is reported at 21 Adv. Cal. 59, 129 P. (2d) 698; it is also set forth at R. 85-87. The opinion in the companion case of *State v. Porter*, is reported at 21 Adv. Cal. 46, 129 P.

(2d) 691; it is also set forth at R. 72-79. The opinion of the intermediate appellate court, the District Court of Appeals, in this case is not officially reported but is unofficially reported at 49 Adv. Cal. App. 223, 121 P. (2d) 537; it is also set forth at R. 67 (see also 67-70 and 60-66 for companion cases). The trial court's opinion is not reported.

II.

Statement of the Case.

We wish to supplement petitioner's statement of the case with a few additional facts. The parties hereto stipulated and the trial court found that on February 27, 1933, The Union Trust Company was insolvent (R. 57, 27). This bank received no general deposits after the close of business on Saturday, February 25, 1933, but all funds thereafter received by it were segregated and held for the respective owners thereof (R. 27-28). After February 27, 1933 no further contracts or debts were incurred by the bank in which in any way affected the liability of its stockholders (R. 29). The status of this bank on and after February 27, 1933 was described by the Supreme Court of Ohio in *Squire v. Harris*, 135 Ohio St. 449, 452, 454, 21 N. E. (2d) 463, 465 as follows:

"It (The Union Trust Company) accepted no general deposits and acquired no new *creditors* after February 27, 1933. It is conceded that such date marks the time when payments to depositors in the ordinary course of business were suspended and the company failed to meet its obligations generally. It never resumed the activities for which it was chartered, and for all practical purposes was under the supervision and domination of the Superintendent of Banks from February 27, 1933. * * *

"It defaulted in meeting its obligations, and desisted from the pursuits which are ordinarily associated with

the normal functioning of a bank. Its status in relation to creditors then (February 27, 1933) became fixed."

Section 359 of the code of Civil Procedure of California (Deering (1941), p. 152 § 359), which the California Supreme Court held barred this action, provides:

"This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

The pertinent provisions of the Ohio constitution and statutes relating to this case are set forth in the appendix to this brief.

III.

Summary of Argument.

A.

Under the Ohio law the statutory assessment of the Superintendent did not create the liability of the stockholder, but it was merely a procedural step necessary for the enforcement by the Superintendent of the liability already existing by virtue of the constitutional provision. In so holding, the California court accorded full faith and credit to the assessment and the statutes of the State of Ohio.

B.

Petitioner's argument that "it was unconstitutional for California to go behind the statutory assessment and resort to a lapse of time prior to the existence of the Ohio Superintendent's cause of action in order to apply Section 359

of the California Code of Civil Procedure" considered and answered.

C.

The State of California did not discriminate against the Ohio Superintendent but it accorded to him all the privileges and immunities which a citizen of California would be entitled to under like circumstances. The Ohio assessment and an assessment under the California Bank Stockholders' Liability Act do not present parallel cases.

IV.

ARGUMENT.

A.

Under the Ohio Law the Statutory Assessment of the Superintendent Did Not Create the Liability of the Stockholder, But It Was Merely a Procedural Step Necessary for the Enforcement by the Superintendent of the Liability Already Existing by Virtue of the Constitutional Provision. In So Holding, the California Court Accorded Full Faith and Credit to the Assessment and the Statutes of the State of Ohio.

Petitioner's brief proceeds upon the premise, assumed but not argued, that the Superintendent's assessment created the liability involved in this case. Indeed, petitioner seems to assume that the necessary attribute of any assessment is the creation of a liability. In so doing, petitioner overlooks the distinction pointed out in the decision in

Harrigan v. Bergdoll, 270 U. S. 560, 46 S. Ct. 413,
70 L. ed. 733

in which this court held that it is for the courts of the state by which a corporation was created to determine whether an assessment of a stockholder's liability was a purely administrative proceeding preliminary to the institution of a suit, or whether the liability came into existence without an assessment.

Petitioner's brief (page 32) quotes from Sections 710-75 of the General Code of the State of Ohio as follows:

"Stockholders of banks shall be held individually responsible, equally, and ratably, and not one for another, for all contracts, debts and engagements of such

bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * * *At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.*" (Italics Petitioner's.)

Petitioner's brief then states (p. 32):

"The right to impose such liability is established by Article XIII, Section 3, of the Ohio Constitution."

Petitioner thus seeks to convey the idea that Section 710-75 creates the liability and that the constitutional provision merely grants the Ohio legislature the right so to do. This conception is flatly contradictory to the Ohio law. The Supreme Court of Ohio repeatedly has held in the clearest language possible that the constitutional provision is a self-executing one; that the liability is created by that provision and not by any statutory provision; indeed, that the general assembly is without power to change or modify that liability; and that the statutory provisions are merely procedural and relate only to the enforcement of the liability.

Lang v. Osborn Bank, 100 Ohio St. 51, 53, 54, 125 N. E. 105, 106.

Squire v. Borton & Borton, 132 Ohio St. 180, 182-183, 5 N. E. (2d) 479, 481.

Snider v. Banking & Trust Co., 124 Ohio St. 375, 377-380, 178 N. E. 840, 841.

State v. Coburn, 133 Ohio St. 192, 203, 12 N. E. (2d) 471, 476-477.

State v. Bremer, 130 Ohio St. 227, 198 N. E. 874.

Squire v. Harris, 135 Ohio St. 449, 21 N. E. (2d) 463.

In *Lang v. Osborn Bank*, 100 Ohio St. 51, 53, 54, 125 N. E. 105, 106, the Supreme Court of Ohio. in referring to

this constitutional provision (adopted by amendment in 1912), said:

"Modern-day constitutions differ much from the constitutions of earlier periods, especially in respect to the delegation of powers to the state general assemblies. As a rule, they are much more specific and particular in the delegation of power, in order to safeguard the public interest; further, they very frequently legislate directly and expressly for the people, rather than place their trust solely in the general assemblies.

"Here, in the amendment of 1912, the constitution makers exercise such power, and in the clearest and most convincing language forever fix that liability free from interference of the general assembly, during the life of such controlling amendment.

"It seems to have been the primary and paramount purpose of the constitution to withdraw this exception from all consideration, amendment, or modification of the general assembly of Ohio."

In the case of *Squire v. Borton & Borton*, 132 Ohio St. 180, 182-183, 5 N. E. (2d) 479, 481, the Ohio Supreme Court held:

"Section 710-75, General Code, in our opinion, makes no change in bank stockholders' constitutional superadded liability. It neither enlarges nor diminishes it. *It does not create new, or extend-existing, liabilities.*" (Italics added.)

The case of *Snider v. United Banking & Trust Co.*, 124 Ohio St. 375, 377-380, 178 N. E. 840, 841, holds squarely that a creditor has the right to enforce the liability of stockholders upon the insolvency of the bank. This case makes it clear that not only does the liability arise, but also the cause of action to enforce the liability accrues when the bank fails to meet its obligations. As to the nature of the constitutional and statutory provisions relating to the liability, the court said:

"By virtue of the constitutional provision, any creditor of a corporation authorized to receive money on

deposit has a valid claim against any stockholder of such corporation to the extent of the amount of the stock of such stockholder. It has been held by this court . . . that this constitutional provision is self-executing and does not require the aid of legislation to make it enforceable. True, it is perfectly competent for the Legislature to provide the machinery for such enforcement, and such machinery has in fact been provided. This legislation is found in sections 710-1 to 710-189 of the General Code, commonly referred to as the Banking Code.

“Except for statutory provision, no one except a creditor could maintain the suit, because of not being a party in interest. The requirement that a suit must be maintained by a party in interest is legislative, and it is therefore competent for the Legislature to create exceptions to that provision of the Civil Code.

“The provisions of the Banking Code are procedural, not substantive, in nature. They create no rights in favor of either the corporation, its stockholders, or creditors. It is the purpose of that Code to merely regulate.”

In *State v. Coburn*, 133 Ohio St. 192, 12 N. E. (2d) 471, and in the earlier case of *State v. Bremer*, 130 Ohio St. 227, 198 N. E. 874, the Supreme Court of Ohio held that the Superintendent of Banks in suing to enforce the stockholders liability is barred by any statute of limitations that would have barred the creditor had he instituted the action.

In the *Coburn* case the court said (133 Ohio State, at p. 203, 12 N. E. (2d) at pp. 476-477):

“The issue of whether the Superintendent of Banks is acting in a sovereign capacity was squarely presented in *State ex rel. Fulton, Supt. of Banks v. Bremer*, 130 Ohio St. 227, 198 N. E. 874, and this court there declared: ‘Such an action is for the benefit of the creditors of the bank and not for the benefit of the

State of Ohio, and *the Superintendent of Banks is barred by any statute of limitations that would have barred the creditor had he instituted the action.*”
(Italics added.)

See also the annotation in 122 A. L. R. 945, at p. 946.

Clearly, under Ohio law the superintendent's assessment is merely an administrative step preliminary to the enforcement by him of the liability and the creditor's cause of action already in existence. The assessment creates no new or independent liability or cause of action.

The Supreme Court of California in applying the California statute of limitations in this case held that the liability of the respondent stockholder was not created by the Superintendent's assessment, but that it was created by the constitutional provision when the bank failed on February 27, 1933. In so holding, the California court accorded to the assessment the same force and effect given to that assessment by the decisions of the Supreme Court of Ohio. Manifestly this was not a denial of full faith and credit, but rather it was the according of full faith and credit to the "public acts" of the State of Ohio.

B.

Petitioner's Argument That "It Is Unconstitutional for California To Go Behind the Statutory Assessment and Resort to a Lapse of Time Prior to the Existence of the Ohio Superintendent's Cause of Action in Order to Apply Section 359 of the California Code of Civil Procedure" Considered and Answered.

Petitioner argues that a statute of limitations cannot constitutionally start to run before a cause of action accrues. In this case there are two answers to this contention. The first is that the cause of action in this case did accrue at the same time that the liability became fixed, that

is, on February 27, 1933, when the bank failed. A creditor of the bank could then have filed suit to enforce the liability. From February 27, 1933 until June 15, 1933, when the Superintendent took over the bank for liquidation, any creditor could have filed such a suit. As a matter of fact, suit was filed by a creditor of The Union Trust Company on March 25, 1933. See *Fulton v. Wetzel*, 47 Ohio App. 72, 190 N. E. 776. True, the Superintendent of Banks subsequently, after taking possession of this bank for liquidation, stepped in and by virtue of the statutory provision, took over the exclusive enforcement of the liability, but such action on his part did not change the fact that the cause of action had accrued.

The time of the accrual of the liability as an unconditional one and the time of the accrual of the creditor's cause of action are the same. The Supreme Court of Ohio has held, as we have shown, that under the Ohio statute of limitations, the Superintendent's action to enforce his assessment is barred if the creditor's action would be barred. In other words, the Superintendent's suit is one to enforce the previously existing cause of action of the creditor and is not a suit founded on a new cause of action. Cases cited by petitioner arising under the National Bank Act and under the banking laws of states other than Ohio to the contrary are misleading because Ohio makes no distinction between a voluntary liquidation and an involuntary liquidation as to the liability and cause of action enforced by the creditor in the one case and by the Superintendent for the benefit of creditors in the other case. The result in this case would be the same whether the three year period of limitation prescribed by Section 359 of the California Code of Civil Procedure is applied from the date of the creation of the liability or from the date of the accrual of the cause of action enforced by the Superintendent.

The second answer to counsel's argument is found in the leading case of *Great Western Telegraph Co. v. Purdy*, 162

U. S. 329, 16 S. Ct. 810, 40 L. ed. 986. In that case this court upheld a decision of the Supreme Court of Iowa holding that the Iowa statute of limitations began to run against a suit by the receiver of an Illinois corporation to collect the unpaid balance of a stock subscription long prior to the time when the assessment upon the stock was levied by order of the Illinois court. The subscription in that case was payable by its terms only upon call of the directors and no such call had ever been made. Thus, the suit was held to be barred in Iowa notwithstanding that prior to the ordering of the assessment, no suit actually could have been maintained.

The plaintiff in error in *Great Western Telegraph Co. v. Purdy* unsuccessfully urged the same contentions here urged by petitioner as is shown by the following propositions from its brief (40 L. ed. 988):

“The decree of assessment of the Illinois court is conclusive in every court, in an action against a stockholder of every defense except the one that he has paid par value,

• • • • •

“This decree of assessment was entitled to be enforced in the courts of Illinois. That it created a cause of action is adjudicated by the Illinois courts. It was therefore entitled to the same full faith and credit in this case in the Iowa court.”

On the authority of *Great Western Telegraph Co. v. Purdy*, the Supreme Court of California, in the case of *Miller v. Lane*, 160 Cal. 90, 94, 116 P. 58, 60, applied Section 359 of the California Code of Civil Procedure to bar a suit on a stockholder's liability created under the laws of Colorado.

Petitioner argues, on page 41 of his brief, in effect that the Ohio statutory provisions must be treated and construed as a part of the Ohio substantive law creating the liability. The answer to this argument is that the Ohio courts have already passed upon this question and decided

the law of Ohio to be that the constitutional provision fixes the liability free from any change or modification by the General Assembly of Ohio. The Ohio statutes therefore do not and cannot create the liability. They are merely procedural.

Petitioner also argues that Section 359 of the California Code of Civil Procedure is closely akin to the New Jersey statute in *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100. We fail to see the similarity. The New Jersey statute prohibited the bringing in New Jersey of any action to enforce the statutory liability of a stockholder arising under the laws of any other state other than a proceeding for an equitable accounting, to which the corporation, its legal representatives and all of its creditors and stockholders should be made parties. This court held that the condition so imposed was legally impossible of performance. The statute thus made impossible the enforcement in any case within the State of New Jersey of a stockholder's liability created under the laws of a foreign state.

Section 359 of the California Code of Civil Procedure did not make it impossible for the Ohio superintendent to enforce the respondent's liability in California. Under the decision of the California court, there was a period of three years from February 27, 1933 in which the Superintendent might have maintained his suit in California. On that date and thenceforth the bank actually was "under the supervision and domination" of the Ohio superintendent as was said by the Supreme Court of Ohio in *Squire v. Harris*, 135 Ohio St. at p. 452, 21 N. E. (2d) at p. 465. The Superintendent formally took over the Union Trust Company for liquidation on June 15, 1933 and then acquired the right to bring the suit. At that time there remained almost two years and nine months in which to file suit in California. Even after the Superintendent made his assessment in this case on July 30, 1934, there was still left

one year and seven months in which to bring this suit. Any contention that the California statute might operate to bar a suit before the cause of action accrues is not based upon the facts of the case now before this court, but upon an entirely hypothetical and speculative case.

This court will note that the application of Section 359 of the California Code of Civil Procedure, unlike the New Jersey statute in *Broderick v. Rosner*, *supra*, is not restricted to liabilities created under the laws of foreign states. It applies to all liabilities created by law without distinction as to the jurisdiction of their origin.

Richardson v. Craig, 11 Cal. (2d) 131, 77 P. (2d) 1077.

Gardiner v. Royer, 167 Cal. 238, 139 P. 75.

Wells v. Black, 117 Cal. 157, 48 P. 1090.

Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 37 P. 499.

Hunt v. Ward, 99 Cal. 612, 34 P. 335.

Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139.

Miller v. Lane, 160 Cal. 90, 116 P. 58.

This California statute is of long standing, having been enacted in 1872. (Code of Civil Procedure of California (1872), p. 93, § 359; Deering (1941), p. 152, § 359.)

The case of *Rankin v. Barton*, 199 U. S. 228, 26 S. Ct. 29, 50 L. ed. 163, cited by petitioner (Brief p. 43), likewise has no application to any question in this case. The decision of this court in that case that the Kansas statute of limitations in question was not put in motion by delay on the part of the Comptroller of the Currency in making an assessment of the liability of the stockholder of a national bank, was based on the fact that a national bank in an instrumentality of the United States and the conclusion of the court that: "As the power of the Comptroller is derived from a statute of the United States, it cannot be controlled or limited by state statutes."

On page 43 of his brief, petitioner quotes extracts from the cases of *Rawlings v. Ray*, 312 U. S. 96, 99, 61 S. Ct. 473, 474, 85 L. ed. 605, 608, and *Baumgardner v. State*, 48 Ohio App. 5, 32, 192 N. E. 349, 361. We submit that these quotations do not support the petitioner's case but, on the contrary, they bring out the very distinction urged by us, namely, the distinction between an action of an administrative officer which renders a contingent liability absolute and an action which is merely a condition precedent to his enforcement of a previously existing liability and cause of action.

The case of *Christmas v. Russell*, 5 Wall 290, 18 L. ed. 475, cited on page 44 of petitioner's brief, has no bearing on this case. That case involved a statute of the State of Mississippi to the effect that no action could be maintained in Mississippi against any resident of Mississippi on a judgment rendered in another state in any case where the cause of action would have been barred by any statute of limitations of Mississippi if the suit had been instituted in Mississippi. In effect this statute was an attempt by the State of Mississippi to give operation to its own statute of limitations in all of the other states. This case is cited and distinguished by this court in the case of *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 339, 16 S. Ct. 810, 40 L. ed. 986, 991.

We submit, therefore, that Section 359 of the California Code of Civil Procedure is not open to attack on the ground that under the pretext of merely affecting remedy or procedure, it denies the right to enforce in California, stockholders' liabilities created under the laws of other states. This statute applies equally to liabilities created under California law and it provides a reasonable time for the institution of suit. The facts in this case show that the Ohio Superintendent had ample time in which to sue in California. The real basis for his complaint is that he slept on his rights.

C.

The State of California Did Not Discriminate Against the Ohio Superintendent But It Accorded to Him All the Privileges and Immunities Which a Citizen of California Would Be Entitled to Under Like Circumstances. The Ohio Assessment and an Assessment Under the California Bank Stockholders' Liability Act Do Not Present Parallel Cases.

Petitioner contends that the California court has unconstitutionally discriminated against the Ohio Superintendent because it held in this case that he had three years from the date of failure of the Ohio Bank in which to sue on his assessment whereas in *Richardson v. Craig*, 11 Cal. (2d) 131, 77 P. (2d) 1077, it held that the *California* superintendent had three years from the date of the levy of a *California* assessment in which to sue. Petitioner argues that in both cases, (a) the bank failed, (b) the superintendent of banks took possession, made his appraisals and estimated the amount of assets to pay liabilities, and (c) levied an assessment, and therefore he concludes that the cases are parallel and there has been an unconstitutional discrimination against the Ohio superintendent. This is specious reasoning since it ignores completely the important distinction between the nature of the liabilities and the causes of action involved in the two cases.

The decision of the California Supreme Court in this case and the decision in *Richardson v. Craig* do not differ as to the interpretation and application of Section 359. In the latter case the court held (11 Cal. (2d) p. 135, 77 Pac. (2d) p. 1079):

“The interpretation of the section has been settled by a long time of cases which, construing the language literally, have held that actions are barred within three years after the obligation was *incurred*.”

The difference in result in the two cases is due to the difference in the liabilities involved. In *Richardson v. Craig*, the court said of the California liability (11 Cal. (2d) p. 137, 77 P. (2d) p. 1080):

“This liability is not ‘created’ when the corporation incurs the debt, nor even when the corporation becomes insolvent; *it does not exist at all prior to the making of the assessment.* It follows that our former decisions holding that the statute began to run when the corporation incurs the debt cannot be controlling in the case of the completely different liability established by the present statute.” (Italics added.)

Thus, under the California Bank Stockholders’ Liability Act, there is no liability or cause of action until the Superintendent levies his assessment. This assessment, therefore, is not a mere procedural step in the enforcement of an already existing liability and cause of action. It creates the only liability and cause of action which ever come into existence.

The decisions of the Ohio Supreme Court previously cited in this brief, show that under Ohio law the liability and the cause of action enforced by a creditor in a voluntary liquidation of a bank are the same liability and cause of action enforced by the Superintendent of Banks in an involuntary proceeding. Hence, the superintendent is barred by any statute of limitations which would have barred the creditor had he instituted the action. *State v. Coburn*, 133 Ohio St. 192, 12 N. E. (2d) 471; *State v. Bremer*, 130 Ohio St. 227, 198 N. E. 874.

Under the decision in this case, the California Supreme Court held that the Ohio Superintendent of Banks had three years from the date of the creation of the liability in which to sue in California. Under the decision in *Richardson v. Craig*, 11 Cal. (2d) 131, 77 P. (2d) 1077, the same rule was laid down with respect to a suit on a California assessment. Thus there was no discrimination against the

Ohio Superintendent in this case. The fact that in one case a given period of limitations begins to run at one time while in another case it begins to run at a different time, is merely the inevitable incident of the application of any statute of limitations to varying kinds of liabilities or causes of action.

California accorded to the Ohio Superintendent the same right of access to its courts as it accords to its own citizens under the same or similar circumstances and consequently it was not guilty of any abridgement of his privileges and immunities.

Conclusion.

We respectfully submit that the Supreme Court of California decided the constitutional questions presented by the petition for certiorari in this case as a basis for review by this court in accordance with the applicable decisions of this court and that there is no debatable constitutional question involved in this case and therefore that the petition for certiorari should be denied.

Respectfully submitted,

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CHARLES O. PARKER,

Of Counsel.